By improperly allocating water for downstream navigation, the court below gave priority to a use that provides less than 1 percent of the Missouri River's economic benefit. (Pet. at 2, citing John E. Thorson, *Voyage of Rediscovery: Lessons from Lewis and Clark for Missouri River Managers*, 6 Great Plains Nat. Resources J., 121, 125 (2002)).

If the Corps is influenced to administer the river in the way directed by the court below, Montana and North and South Dakota will again see their reservoirs drained to record low levels, placing Montana's waters and other resources at risk. Such a management regime will result in substantial economic harm to the upstream states, including Montana.

CONCLUSION

The decision of the court below is inconsistent with the 1944 Flood Control Act and with the Corps of Engineers' Interpretation of the Act. It fails to protect the upstream states' uses of the Missouri River. The state of Montana supports the petition of North Dakota and South Dakota and urges the Court to grant certiorari.

(9)

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In The Supreme Court of the United States

STATE OF NORTH DAKOTA
and STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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ARGUMENT

I. The court of appeals' ruling that the Flood Control Act gives navigation a priority is not dictum, and it is a ruling that harms the Dakotas.

A. Dictum. Federal respondents assert that the Eighth Circuit's ruling that the 1944 Flood Control Act[1] gives navigation a priority had no bearing on its decision and that the ruling is mere dictum. U.S. Brf. in Oppos. at 9-10. The discussion of navigation and its priority was not, however, a mere aside. Pet. App. at 15-16.

Downstream interests asserted that the 2004 Master Manual violates the Flood Control Act. Pet. App. at 12-13. The Eighth Circuit was thus required to interpret the Act and decide what, if any priorities it sets and whether the new Manual is consistent with them. The court found that the Act gives navigation a priority and that the Manual is valid because it is consistent with this priority and other terms of the Flood Control Act. In particular, the court stated that a "'dominant function[]'" of the Act is "'to maintain downstream navigation,'" and that under the Act recreation and wildlife are "'secondary uses.'" Pet. App. at 15 (citing *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied, North Dakota v. Ubbelohde*, 541 U.S. 987 (2004)). "'[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration . . . that ruling becomes the law of the circuit.'" *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (quoting *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001)

[1] Pub. L. No. 78-534, 58 Stat. 887 (1944).

(Kozinski, J., concurring)). Addressing whether the Flood Control Act assigns priorities was not only germane but necessary to assess the Master Manual's legality.

Determining priorities was also necessary to review challenges to the manner in which federal agencies complied with the Endangered Species Act ("ESA").[2] Pet. App. at 17-19. The State of Nebraska and the Nebraska Public Power District ("Nebraska Parties") asserted that the Corps should not have engaged in ESA consultations with the U.S. Fish & Wildlife Service because to do so would interfere with the navigation-priority mandated by the Flood Control Act. *Id.* at 17-18. The court rejected the claim, finding that ESA compliance did not necessarily "prevent the Corps from meeting its statutory duty under the FCA to support downstream navigation." *Id.* at 19. The court, however, added that if ESA compliance were to jeopardize navigation, then "the ESA would not apply." *Id.* at 19 n.9.

In a companion "Missouri River Litigation" decision, the navigation-priority was further applied by the Eighth Circuit. North Dakota sought to apply water quality standards it adopted under the Clean Water Act[3] to the Corps' Garrison Dam operations. *In re Operation of Missouri River System Litigation*, 418 F.3d 915, 916-17 (8th Cir. 2005). The court affirmed the suit's dismissal. A reason for doing so was its conclusion that state water quality standards are pre-empted. *Id.* at 919-20. The Flood Control Act makes navigation a dominant function and if

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[2] 16 U.S.C. §§ 1531 *et seq.*

[3] 33 U.S.C. §§ 1251 *et seq.*

state water quality standards were to apply that "would frustrate the design of the [Act]." *Id.* at 920.

Given the clarity and role of the Eighth Circuit's navigation-priority ruling in the decision below, coupled with its 2003 *Ubbelohde* decision, that court would be surprised at the suggestion that its construction of the Flood Control Act is mere dictum. The court's 2003 and 2005 rulings resolving disputes over the Act's purposes and priorities make it unlikely it will again consider the issue. Indeed, the Eighth Circuit essentially confirmed the precedent-setting nature of its ruling in rejecting North Dakota's Clean Water Act suit. "The dominant functions of the project are flood control and downstream navigation, and secondary interests include irrigation, recreation, fish and wildlife." *Missouri River Litigation*, 418 F.3d at 919.

The government is alone in its constricted view of the decision. Downstream interests assert that the court issued a precedent-setting ruling. Missouri Brf. in Oppos. 2-3; Neb. Brf. in Oppos. 1, 9-10, 16. And they rely on it to protect downstream interests. *E.g.*, Letter from Missouri Gov. Blunt to Corps of Engineers at 3 (Dec. 16, 2005) ("The Eighth Circuit . . . stated that navigation is one of the two dominant purposes . . . Therefore, any water used to support fish and wildlife should not be at the expense of navigation").[4] Other parties agree that the court's navigation-priority ruling was not dictum. Envt'l Defense & Nat'l Wildlife Fed'n Brf. in Support of Pet.; Montana Amicus Brf. in Support of Pet.; Mandan, Hidatsa, and Arikara

[4] The letter is at http://gov.missouri.gov/press/AOP-letter12-16-05.pdf.

Nation and Cheyenne River Sioux Tribe Amicus Brf. in Support of Pet.

B. Harm. It is asserted that the petition should be denied because the Dakotas are not adversely affected and that any harm is speculative. U.S. Brf. in Oppos. 7, 10-11; Missouri Brf. in Oppos. 3-4. The basis for this argument is that the Dakotas did not appeal the district court's decision to uphold the Corps' 2004 Master Manual and the Eighth Circuit affirmed that ruling.

The Dakotas sought a judgment declaring that the Flood Control Act does not give navigation a priority but requires equitable treatment of all uses. *E.g.*, S.D. Third Amended Cmplnt. at ¶ 72; N.D. Third Amended Cmplnt. at ¶¶ 82-86. The Dakotas prevailed in the district court, which held that the Pick Plan "did not rank any river interest above another" and that the Sloan Plan "does not dictate priority of river interests." Pet. App. at 40. "[T]he Corps must consider, evaluate, and balance all interests." *Id.* at 88. *See also id.* at 41-42. The court also upheld the new, 2004 Master Manual, and it does not contain the navigation-priority language found in the 1979 Manual. The new Manual states just the opposite. "Congress did not assign a priority to [project] purposes. Instead, it was contemplated that the Corps . . . would balance these functions in order to obtain the optimum development and utilization of the water resources of the Missouri River basin to best serve the needs of the people." 2004 Master Manual at VII-1.

Because the Dakotas obtained the construction of the Act they sought and obtained a substantially revised Master Manual, they did not appeal the district court's decision. Though the Eighth Circuit affirmed, in doing so

it resurrected, to the Dakotas' detriment, the navigation-priority. It established a legal regime governing the river and how the Corps will implement the Master Manual. Upstream reservoirs will be operated for downstream barges. The holding below revived an obsolete principle under which the Corps had managed the river and which led to present, dangerously low reservoir levels.[5]

Had the Corps not been releasing so much water to support navigation, particularly during the drought's early years, upper basin problems would be less pronounced. Upstream reservoirs recently set record low elevations. U.S. Army Corps of Engineers, *Missouri River Mainstem System 2005-2006 Annual Operation Plan* at 17 (Jan. 2006) ("2006 AOP"). Some communities in the Dakotas lost their water supply due to the low water, and others are on the brink of losing theirs.[6] Farmers needing irrigation have lost their water source.[7] Low water has caused quality problems for drinking water.[8] Access to lakes via boat ramps has been disrupted and businesses dependent on lake recreation have suffered and some have closed.[9]

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[5] Though federal officials have often stated that navigation does not have a priority, Pet. at 22-23, the 1979 Master Manual expressed a navigation-priority and the Corps considered itself bound to apply the priority until the Manual could be revised.

[6] *E.g.*, Pet. at 9 n.4; Mandan, Hidatsa, and Arikara Nation and Cheyenne River Sioux Tribe Amicus Brf. in Support at 4 n.3; 2006 AOP at 28-29.

[7] *E.g.*, JA at 00334 (Priner Decl.); JA at 05218 (Hoeven and Rounds letter); JA at 01404-21 (Rath Aff.).

[8] *E.g.*, JA at 00332 (Priner Decl.).

[9] *E.g.*, JA at 00336-340 (Cooper Decl.); JA at 01466-67 (Power Aff.).

And, of course, low water has damaged fisheries.[10] Indeed, the origins of this litigation rest in the Dakotas' effort in 2002 to save the crucial spring smelt spawn in Lakes Sakakawea and Oahe, which the Corps was willing to destroy to protect navigation; and in 2002 Lake Sakakawea's smelt biomass declined 90%.[11]

As a district court stated, "it is clear . . . that the Corps, in times of low water flows . . . always chooses to seriously impact upstream states to continue navigation . . . The more dire the water conditions upstream, the more water that is being released." *South Dakota v. Ubbelohde*, CIV 02-3011 Prelim. Injunc. at 7 (D.S.D. May 13, 2002). Under the decision below – in which the government finds no harm – the Eighth Circuit even permits the Corps to *abandon* upstream interests should navigation so require. Pet. App. 16 n.7.

To assert that concerns about a navigation-priority are mere speculation is ill-founded and ignores history. The de facto priority under which the Corps has been operating, and which has resulted in record low elevations leading to diverse harmful consequences, is now de jure. And navigation's water needs are "lavish." John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 Neb. L. Rev. 816, 836 (2001). During droughts there will not be much water for the Dakotas – the water will be used to float barges under an irrational regime, one that would prefer navigation, which at best provides a $9

[10] *E.g.*, JA at 00339-40 (Cooper Decl.); JA at 00118-19 (Hendrickson Aff.); JA at 00126-128 (Power Aff.).

[11] JA at 00118 (Hendrickson Aff.).

million annual economic benefit, Pet. at 7, over hydropower, recreation, and water supply and their $674 million, $87 million, and $611 million annual benefits. JA at 07196-98. It is beyond dispute that a navigation-priority harms the upper basin.

C. Summary. The decision below was a significant blow to the Dakotas' effort to obtain a ruling that the Corps must not play favorites. The decision establishes a legal regime governing the river's future. It defines the law of the river. It is neither dictum nor an inconsequential decision without adverse affects for the Dakotas.

II. The court of appeals made errors of law.

Missouri and the Nebraska Parties argue that the Flood Control Act does, in fact, give navigation a priority. Missouri cites the Act's opening statement and its reference to "'navigation and flood control.'" Missouri Brf. in Oppos. at 5. But this language does not establish priorities. It articulates the authority under which Congress exercised jurisdiction over the river in accordance with the implicit requirement for such a statement. *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63 (1913). And in the same sentence that Missouri cites, Congress added:

> it is hereby declared to be the policy of the Congress . . . to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers . . . and to limit . . . navigation works to those . . . which can be operated consistently with appropriate and economic use . . . of such rivers by other users.

Pet. App. at 90.

Though the Nebraska Parties present a number of arguments for their view of the Act, Neb. Brf. in Oppos. at 9-13, we will not respond point-by-point to them. Most of these issues have been addressed. Pet. at 14-22. It will suffice to note that the Joint Report, authored by the Bureau of Reclamation and Corps of Engineers to reconcile their Pick and Sloan Plans, was adopted by Congress as a part of the Flood Control Act. Pet. App. at 97. The Report, and thus the Act, states that the Missouri River Basin is to be developed to "secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 109. There is no priority here. Congress named many uses for which the river is to be managed but did not assign priorities to them.

The Nebraska Parties assert that the Dakotas want the courts to "second guess" the wisdom of policy choices expressed in the Act. Neb. Brf. in Oppos. at 1, 8, 19. To the contrary, we ask this Court to confirm the Act's plain requirements, that is, that all project purposes – navigation, farmland irrigation, recreation, power generation, wildlife, domestic and industrial water supply – be equitably considered and balanced. The Nebraska Parties state that the Dakotas want the system operated for recreation and wildlife "to the exclusion of flood control and navigation." *Id.* at 14. This too misrepresents our position. We acknowledge that flood control has priority and do not assert that the Corps must protect upstream interests to the "exclusion" of others. But recreation and wildlife drinking water, irrigation, and hydropower should not be tossed to the end of the line, always deferring to navigation.

CONCLUSION

In its 2003 *Ubbelohde* decision, the Eighth Circuit seemed to interpret the Flood Control Act as giving navigation a priority. That it did indeed do so is confirmed by the decision below. That decision now governs Missouri River management. It affects the interests of citizens, state and tribal governments, businesses, and sportsmen in one of America's pre-eminent resources. It is a fundamentally important decision worthy of review. Further, it limits the Clean Water Act and could be used to limit the Endangered Species Act, two prominent environmental laws. The Petition should be granted.

Respectfully submitted,

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